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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

Office-Supreme Court,
FILED

JUN 10 1948

CHARLES ELMORE CROFT
CLERK

No. 118 86

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

**CIVIL AERONAUTICS BOARD, AND NATIONAL AIR
LINES, INC.,**

Respondents

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA**

✓ **HENRY KAISER,**
✓ **GERHARD P. VAN ARKEL,**
1830 Jefferson Place, N. W.,
Washington 6, D. C.,
Counsel for Air Line Pilots
Association, International.

Of Counsel:

✓ **DANIEL D. CARMELL,**
130 N. Wells Street,
Chicago, Illinois;
✓ **SAMUEL H. JAFFEE,**
Dupont Circle Building,
Washington 6, D. C.



SUPREME COURT OF THE UNITED STATES

October Term 1901

Mr.

JAMES H. HARRIS, PLAINTIFF,
vs.
THE UNITED STATES, DEFENDANT.

On the 1st day of October, 1901, the following
case was called for trial:

JAMES H. HARRIS, PLAINTIFF,
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Attest:

By the Court:
Chief Justice

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*To the Honorable the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Air Line Pilots Association, International, prays that a writ of certiorari issue to review the Judgment and Decree of the United States Court of Appeals for the District of Columbia, entered on April 23, 1948, insofar as the Judgment and Decree dismissed petitioner's petition for review of an order of the Civil Aeronautics Board, dated March 29, 1948.

Opinions Below

The court below rendered no opinion other than the said Judgment and Decree of April 23, 1948 (R. 96). The

order of the Civil Aeronautics Board which petitioner sought to have reviewed is as yet unreported. It appears in the record at page 25.

Jurisdiction

The jurisdiction of this Court is invoked under Section 1006 (f) of the Civil Aeronautics Act of 1938, as amended (52 Stat. 977, 49 U. S. C. A. Supp. sec. 646 (f)), Section 240 (a) of the Judicial Code, as amended (28 U. S. C. A. sec. 347 (a)), and Rule 38, paragraph 5 (c) of the Court.

Statutes and Regulations Involved

The pertinent provisions of the Civil Aeronautics Act of 1938, as amended (52 Stat. 977, 49 U. S. C. A. Supp. sec. 401 *et seq.*), are set forth in the Appendix, *infra*, pages 11-12.

The pertinent provisions of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. A. Supp. sec. 1001 *et seq.*), are set forth in the Appendix, *infra*, pages 12-13.

The pertinent provisions of the Railway Labor Act (49 Stat. 1189, 45 U. S. C. A. Supp. sec. 151 *et seq.*), are set forth in the Appendix, *infra*, pages 13-14.

The pertinent provisions of the Civil Aeronautics Board's Economic Regulations (Part 285 of its Rules of Practice), are set forth in the Appendix, *infra*, pages 14-15.

Question Presented

1. Whether petitioner has, under the Civil Aeronautics Act, disclosed a "substantial interest" in, or, under the Administrative Procedure Act, is a person "suffering legal wrong" or is "adversely affected or aggrieved" by, the order of the Civil Aeronautics Board which petitioner sought to review in the court below.

Statement

The proceedings in the court below began with a petition filed on April 5, 1948, by Air Line Pilots Association, Inter-

national (Association) (R. 1), a labor organization representing pilots employed by National Air Lines, Inc. (National), seeking review and stay of an order of the Civil Aeronautics Board (Board) (R. 25), which granted to National a "temporary mail rate" including a retroactive award of public monies amounting to \$545,000 and further increased compensation of approximately \$60,000 per month.

The proceedings which led to the order referred to may be summarized as follows: On October 31, 1947, National filed with the Board, an administrative agency of the Federal Government, a supplemental petition for a "temporary mail rate" (R. 17). On January 23, 1948, certain of National's employees, represented by the International Association of Machinists, a labor organization, went on strike (R. 19). On January 30, 1948, the Board denied National's petition (R. 18). On February 2, 1948, National filed a petition with the Board for reconsideration; this petition referred to the strike as a reason for asking for the "temporary mail rate" (R. 18, 35). On February 3, 1948, certain of National's pilots, represented by the Association, went on strike (R. 19). On February 9, 1948, National filed an amended petition deleting any reference to the strike (R. 25). On February 24, 1948, the Board issued an order "directing National to show cause why a proposed temporary rate should not be established" (R. 18-19).¹

On March 1, 1948, the Association, in its own behalf as a labor organization having contractual relations with National, in behalf of its pilot members who were (and still

¹ Under the Board's procedure set out in its Economic Regulations, sec. 285.13(b) (1) and (2), it is provided that "In proceedings instituted upon petition . . . , the Board, before further procedural steps are taken, will normally issue an order directing the parties to show cause why specified rates . . . should not be fixed and determined by the Board"; it is further provided that "The rates . . . specified in any order issued pursuant to this section will represent tentative rates. . . ."

are) engaged in the strike referred to, and in behalf of the public, petitioned the Board (R. 19) for leave to intervene in the "temporary mail rate" proceedings.

The Board, by its Opinion and Order of March 5, 1948 (R. 18), denied the Association the right to intervene, though permitting it "to participate", subject, however, to prescribed limitations placed by the Board upon the issues and the evidence the Association sought and offered to adduce. These limitations, as described by the Board in its said Opinion and Order of March 5, 1948 (and adopted by it in the subsequent proceedings before the Board referred to hereinafter), were principally based on the Board's assertion therein that in "temporary" rate proceedings "compliance with substantive and procedural statutory requirements [is] impossible . . ."; that there are "only two requirements that must be met to entitle a carrier to a temporary rate . . . [1] that its immediate financial position is critical [and (2)] that its existing rate is substantially inadequate"; that "substantial reliance must necessarily be placed on the data submitted by the [airline; and that] the emphasis [must be placed] on speedy determination [and] on estimates . . ."

Such limitations, as alleged by the Association below, necessarily resulted not only (1) in complete abandonment by the Board of the "substantive and procedural statutory requirements" provided by the Civil Aeronautics Act, and which must be applied by the Board in the determination of mail rates, but in addition (2) in abandonment by the Board of the principles of fair hearing and due process required by said Act, by the Board's Economic Regulations, by the Administrative Procedure Act, and by the Constitution of the United States.

The said *substantive* statutory requirements principally consist of: (a) public interest, convenience and necessity (Civil Aeronautics Act, secs. 2 and 401(d)(1)); (b) compli-

ance by the airline with title II of the Railway Labor Act (Civil Aeronautics Act, sec. 401(1)(4)); and (c) need by airline for adequate mail-rate compensation "under honest, economical, and efficient management" (Civil Aeronautics Act, secs. 406(b) and 1002(e)(5)).

The chief *procedural* statutory requirement and principle of fair hearing violated by the Board involves sec. 285.13 (b)(2) of the Board's Economic Regulations,² and sec. 8(b) of the Administrative Procedure Act.³ Nowhere in any of its orders or decisions did the Board incorporate the exhibits referred to or include a statement of the reasons or basis for its findings and conclusions upon the material issues, nor have such exhibits ever been made available to the Association or seen by it.

Following a purported "hearing" which was thus limited (to all of which, and to the denial of intervention, the Association duly objected) the Board by its order of March 29, 1948 (R. 25), granted a "temporary mail rate" to National, increasing by approximately \$60,000 per month the sums to be received by National for the carriage of mail, and also granted to National a retroactive award of \$545,000. This order was a complete reversal of the earlier order of the Board issued January 30, 1948, only three weeks before, which had denied National's petition for a temporary mail rate.

On April 5, 1948, as stated above, the Association filed a petition seeking review and stay of the Board's order of March 29, alleging therein the substance of the above. On April 8, the Board filed objections to the request for stay,

² ". . . Such orders [setting rates] will be accompanied by and incorporate exhibits setting forth the basis upon which the tentative rates . . . have been formulated."

³ ". . . All decisions (including initial, recommended, or tentative decisions) shall . . . include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record. . . ."

and, on April 9, a motion to dismiss the petition (R. 1, 5, 30). On April 14, the Association filed a reply to the objections (R. 34). On April 21, oral argument on these documents was had before the court below. On April 23, the court below issued a Judgment and Decree denying the petition for stay, and granting the motion to dismiss "for failure by petitioner to disclose a substantial interest in the order sought to be reviewed" (R. 96).⁴

Specification of Errors to Be Urged

The Court below erred:

1. In dismissing the Association's petition for review assertedly "for failure by petitioner to disclose a substantial interest in the order sought to be reviewed", and in failing to find that such interest was disclosed, under the Civil Aeronautics Act, sec. 1006 (a).
2. In failing to find that the Association was a person "suffering legal wrong" and one "adversely affected or aggrieved" by the Board's order of March 29, 1948, within the meaning of the Administrative Procedure Act, sec. 10 (a).

Reasons for Granting the Writ

1. The issue here involved raises a substantial question directly affecting the public interest. The Civil Aeronautics Act is clearly designed principally to protect the public interest (see sec. 2, Appendix, page 11; *W. R. Grace & Co. v.*

⁴ Since the court below based its Judgment and Decree solely on the asserted failure to disclose the substantial interest referred to, no reference is made herein to the issue of whether the Board's order, review of which was sought in the court below, was a final order; that issue was raised below, but is clearly not before us in the present posture of the case.

Civil Aeronautics Board, 154 F. 2d 271 (C. C. A. 2)). Courts will go farther to protect the public interest than they are accustomed to go when only private interests are involved. *Virginian Ry. Co. v. System Federation*, 300 U. S. 515, 552; *FCC v. Sanders Bros. Radio Station*, 309 U. S. 470, 476-7; *Scripps-Howard Radio v. FCC*, 316 U. S. 4, 15-18; *American Power & Light Co. v. FCC*, 325 U. S. 385, 390-1. As the Second Circuit, commenting upon the *Sanders* and *Scripps-Howard* cases, said (In *Associated Industries of New York v. Ickes*, 134 F. 2d 694, 704): “. . . Congress can constitutionally enact a statute conferring on any non-official person . . . authority to bring a suit to prevent action by an officer in violation of his statutory powers . . . even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals.”

The Civil Aeronautics Act, sec. 1006 (a) says that “Any order [with an exception not here pertinent] shall be subject to review . . . upon petition . . . by any person disclosing a substantial interest in such order . . .” The Administrative Procedure Act, sec. 10 (a) says that, “Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action, within the meaning of any relevant statute, shall be entitled to judicial review thereof.”⁵ Under sec. 285.6 (b) of the Board's Economic Regulations, it appears that petitions for intervention will generally be granted where the petitioner has a “property or financial interest” (Appendix page 14). It has been stated hereinabove that the Civil Aeronautics Act (sec. 401 (1) (4)) makes it a condition

⁵ Under sec. 1(27) of the Civil Aeronautics Act, a person includes “any association . . .”; sec. 2(b) of the Administrative Procedure Act is to the same effect.

upon the holding of a certificate of public convenience and necessity that the airline comply with the labor legislation referred to in title II of the Railway Act. The rights granted the Association under the Railway Act have been recognized by this Court as valuable constitutional and property rights. *Texas & N. O. Ry. Co. v. Bro. of Ry. & SS. Clerks*, 281 U. S. 548, 571.

2. It is not necessary for a person, in order to be "adversely affected or aggrieved", for such person to be a competitor as that term is more commonly understood. One may be so affected or aggrieved in other ways. The relationship of the Association to National and to the proceedings was not that of a stranger, nor that of a taxpayer, nor of some other person whose connection with the proceedings is insubstantial, indirect, or remote.⁶ In this instance, the effect of the Board's order in granting National a temporary mail rate is that the power of the government has been injected into an economic contest between a labor organization and an employer, on the side of one contestant, and that this has been done by resort to a procedure which is illegal, arbitrary, and capricious. Clearly, the monies unlawfully awarded by the Board to National (which in one year will total well over a million dollars)⁷ will be of mate-

⁶ For example, as in the cases of *Perkins v. Lukens Steel Co.*, 310 U. S. 113; *Mass. v. Mellon*, 262 U. S. 447; see also other decisions summarized in the Reply to Objections to Stay of Order (R. 34, 43-46).

⁷ We are informed that some \$400,000 or more has already been paid, and that \$60,000 of increased compensation will continue to be paid monthly—unless the Board's procedure is held invalid.

rial assistance to National in this economic contest. Those familiar with the dynamics of such contests know full well that such a strengthening of one side works a weakening of the other, for the outcome of such contests generally depends upon the relative economic strength of the participants. The Association is, under the circumstances, at least "adversely affected or aggrieved." This is especially true where, as here, it is the public interest which is primarily involved and not mere private litigation. See the *Sanders*, *Scripps-Howard*, *Associated Industries*, *Grace*, and *American Power & Light Co.* cases referred to above. The dismissal by the court below of the Association's petition for review is in conflict with the decisions of the Second Circuit cited above, and the court below has not given proper effect to the *American Power & Light* and other decisions of this Court.

3. To deny judicial review on the facts set out would have these pernicious results: (a) there could be no review by anyone of an order which the Association asserts is illegal, arbitrary, and capricious; (b) the Board will have given away thousands of dollars of public monies because of the application of standards of the Board's own creation—standards which clearly conflict with those laid down by Congress; (c) the Board's refusal even to consider evidence that National violated the Railway Act means that the government rewards the law breaker, while, at the same time, it punishes the public and the Union, who desire the law upheld; and (d) the refusal even to consider evidence that National is not conducting its business honestly, economically, and efficiently, means that a carrier guilty of even the grossest dishonesty is nevertheless rewarded by the government.

Conclusion

WHEREFORE, petitioner respectfully prays that this petition be granted.

Respectfully submitted,

HENRY KAISER,
GERHARD P. VAN ARKEL,
*1830 Jefferson Place, N. W.,
Washington 6, D. C.,
Counsel for Air Line Pilots
Association, International.*

Of Counsel:

DANIEL D. CARMELL,
*130 N. Wells Street,
Chicago, Illinois;*
SAMUEL H. JAFFEE,
*Dupont Circle Building,
Washington 6, D. C.*

June, 1948.

APPENDIX

Civil Aeronautics Act of 1938 as Amended

The pertinent provisions of the Civil Aeronautics Act of 1938, as amended, 52 Stat. 977, 49 USCA Supp. sec. 401 et seq., are as follows:

SEC. 1. [DEFINITIONS] As used in this Act, unless the context otherwise requires—

.

(27) "Person" means any . . . association . . .

SEC. 2. [DECLARATION OF POLICY] In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

.

(c) The promotion of adequate, economical, and efficient service by air carriers . . .

SEC. 401(d)(1). [CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY] The Board shall issue a certificate authorizing the . . . transportation covered by the application, if it finds that the applicant is fit, willing, and able to . . . conform to the provisions of this Act . . . and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

SEC. 401(l)(4). [Compliance with Labor Legislation] It shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with title II of the Railway Labor Act, as amended.

SEC. 406(b). [RATES FOR TRANSPORTATION OF MAIL] In fixing and determining fair and reasonable rates of compensation under this section, the Board . . . shall take into consideration, among other factors, . . . the need of each such air carrier for compen-

sation for the transportation of mail sufficient . . .
to enable such air carrier under honest, economical, and
efficient management, to maintain and continue the
development of air transportation . . .

SEC. 1002(e). [COMPLAINTS TO AND INVESTIGATIONS BY
THE BOARD. Rule of Rate Making] In exercising and
performing its powers and duties with respect to the
determination of rates for the carriage of persons or
property, the Board shall take into consideration,
among other factors—

.

(5) The need of each air carrier for revenues suffi-
cient to enable such air carrier, under honest, economi-
cal, and efficient management, to provide adequate and
efficient air carrier service.

SEC. 1006(a). [JUDICIAL REVIEW] Any order, affirm-
ative or negative, issued by the Board under this Act
[with an exception not here pertinent] shall be subject
to review by . . . the United States Court of Ap-
peals for the District of Columbia upon petition . . .
by any person disclosing a substantial interest in such
order . . .

SEC. 1006(f). The judgment and decree of the court
affirming, modifying, or setting aside any such order
of the Board shall be subject only to review by the Su-
preme Court of the United States upon certification or
certiorari as provided in sections 239 and 240 of the
Judicial Code.

Administrative Procedure Act

The pertinent provisions of the Administrative Pro-
cedure Act, 60 Stat. 237, 5 USCA Supp. sec. 1001 et seq.,
are as follows:

SEC. 2. [DEFINITIONS] As used in this Act—

.

(b) * * * "Party" includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding * * *

SEC. 8. [DECISIONS] * * * (b) * * * All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record * * *

SEC. 10. [JUDICIAL REVIEW] Except as far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) * * * Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Railway Labor Act

The pertinent provisions of the Railway Labor Act, 49 Stat. 1189, 49 USCA sec. 151 et seq., are as follows:

SEC. 201. [TITLE II; COMMON CARRIERS BY AIR; APPLICATION TO COMMON CARRIERS BY AIR] All of the provisions of title I of this Act, except the provisions of section 3 thereof, are extended to and shall cover every common carrier by air engaged in interstate and foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers * * *

SEC. 202. [EXTENT OF APPLICABILITY OF TITLE I TO AIR CARRIERS] The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of title I of this Act, except section 3 thereof, shall apply to said carriers by air and their employees

in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee", respectively, in section 1 thereof.⁸

Economic Regulations

The pertinent provisions of the Civil Aeronautics Board's Economic Regulations (Part 285 of its Rules of Practice) are as follows:

285.6 APPEARANCES BY THIRD PERSONS AND FORMAL INTERVENTIONS

.

(b) Formal Interventions.

(1) Any person having a substantial interest in the subject matter of any proceeding may petition for leave to intervene in such proceeding and may become a party thereto upon compliance with the provisions of this paragraph. In general, such petitions will not be granted unless it shall be found:

(i) that such person has a statutory right to be made a party to such proceeding; or

(ii) that such person will or may be bound by the order to be entered in the proceeding; or

(iii) that such person has a property or financial interest which may not be adequately represented by existing parties, if such intervention would not unduly broaden the issues or delay the proceeding . . .

⁸ The principal provisions of title I which National allegedly violated are: *Sec. 1, First* (duty "to exert every reasonable effort to make and maintain agreements, rates of pay, rules, and working conditions, and to settle all disputes . . ."); *Second* (disputes to "be considered, and, if possible, decided, with all expedition, in conference between" carrier and Union); *Fourth* ("Employees shall have the right to organize and bargain collectively through representatives of their own choosing"); and *Sixth* (duty to confer with other party in case of labor dispute).

285.13 PROCEDURE IN RATE PROCEEDINGS

• • • • •

• • • (b) Order setting tentative rates, fares or charges.

(1) In proceedings instituted upon petition or complaint, the Board before further procedural steps are taken, will normally issue an order directing the parties to show cause why specified rates, fares, or charges set out in such order should not be fixed and determined by the Board.

(2) The rates, fares, or charges specified in any order issued pursuant to this section will represent tentative rates, fares, or charges which appear to the Board to be fair and reasonable on the basis of the carrier's monthly and annual reports and other information available to the Board. Such orders will be accompanied by and incorporate exhibits setting forth the basis upon which the tentative rates, fares, or charges have been formulated.

(6643)